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No. 02-851

In the Supreme Court of the United States

KAREN WINTERS,

Petitioner,

v.

MTL SYSTEMS, INC. AND ARNOLD FIFE AND JAMES MCCRACKEN

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

FRANK M. PAYSON, ESQ.
Counsel of Record

LAW OFFICES OF FRANK M. PAYSON, P.C.
120 W. SECOND STREET
SUITE 400
DAYTON, OH 45402
(937) 222-4529
(937) 222-8044 FAX

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit Court of Appeals Did Not Apply Both Prongs of the Affirmative Defense Set Forth By This Court in *Burlington v. Ellerth* and *Faragher v. City of Boca Raton* and Did Not Properly Apply the Defense in Accordance with Both Congress' Purpose in Enacting Title VII and the Principles Enunciated By This Court in Formulating the Defense.

A. The Sixth Circuit Court of Appeals Did Not Apply Both Prongs of the Affirmative Defense to the Facts of This Case

The *Ellerth* and *Faragher* decisions specifically set forth the standard for determining employer liability for supervisor harassment in a case in which no tangible job detriment had occurred:

> **An employer is subject to <u>vicarious liability</u> to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.** When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense **comprises <u>two necessary</u> elements**: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, ***<u>and</u>***

(b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 760 (1998).

[Emphasis added to original]

This Court's decision is clear that a vicarious liability standard is to be applied subject to an affirmative defense which an employer must prove both prongs. The employer's satisfaction of the reasonable care prong alone is insufficient to shield the employer.

Emphasizing the requirement that employers satisfy both prongs, Justice Thomas wrote in *Ellerth* that an employer cannot possibly prevail on a summary judgment motion in a case in which the employee reported the alleged harassment. Further, Justice Thomas (joined by Justice Scalia) interpreted the majority and concurring opinions as holding that an employee who reports sexual harassment cannot, as a matter of law, be found to have failed unreasonably to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. *Ellerth at p. 766-67.* Justice Thomas also opined at page 773 in *Ellerth* that "employers will be liable notwithstanding the affirmative defense, even though they acted reasonably, so long as the plaintiff in question fulfilled her duty of reasonable care to avoid harm". Therefore it is clear that once an employee reports sexual harassment - the affirmative defense is unavailable to the employer.

In the instant case, even assuming that MTL Systems, Inc. could establish that it acted reasonably to prevent and

correct violations, the *Ellerth* defense still required MTL Systems, Inc. to demonstrate that Karen Winters "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer." MTL Systems did not satisfy this requirement.

The District Court incorrectly ruled (and the Sixth Circuit incorrectly affirmed) that "[t]o avail itself of the *Ellerth/Faragher* defense, an employer must show that it took reasonable care to prevent sexual harassment and to cure any incidents which happened." *See p. 11-12, District Court's opinion.* The lower court then analyzed this first prong of *Ellerth/Faragher* only for two pages, concluding that MTL was not liable for sexual harassment of Winters by McCracken "[b]ecause MTL took reasonable steps to prevent sexual harassment and to cure what it was told had happened..." *See page 14, District Court's Opinion.*

The District Court and Sixth Circuit stopped their analysis with the first prong of the defense, and neither found nor analyzed whether Winters "unreasonably failed to take advantage of any preventive or corrective opportunities provided" by MTL or, similarly, that her report of sexual harassment was untimely or otherwise defective. As Respondents even acknowledge, the District Court and Sixth Circuit "did not expressly make a specific finding with regard to the second prong of the affirmative defense..."

In an attempt to cover up the deficiency of the District Court and Sixth Circuit's incorrect analysis and cherry-picking of one of the two required, joint elements of the defense, Respondents only argue that consideration of the second prong "was inherent" in the court's decision. Try as they may, Respondents argument does not cure the District Court and Sixth Circuit's misapplication of prevalent sexual

harassment law issued from this Court. Before *Ellerth*, the District Court and Sixth Circuit's analysis and decision would have been acceptable inasmuch that courts were allowed to hold that an adequate response to a supervisor's harassment by itself insulated the employer from liability for that harassment. After *Ellerth*, however, employers are held to be liable if the employee reasonably utilized an employer's complaint procedure or avoided harm. *See Moore v. Sam's Club and Watts v. Kroger Co., supra.*

The lower courts' finding and analysis demonstrates that MTL did not satisfy both prongs of the *Ellerth/Faragher* affirmative defense, and therefore summary judgment on Petitioner's Title VII claim was not warranted.

B. The Sixth Circuit Court of Appeal's Decision is Inconsistent with Both Congress' Purpose in Enacting Title VII and the Principles Enunciated By This Court in Formulating the Defense.

Petitioner's interpretation and reading of *Ellerth/Faragher* is neither erroneous nor inappropriately narrow, as Respondents suggest. While the facts of *Ellerth/Faragher* are not on point with the facts in Petitioner's case, the substantive law of *Ellerth/Faragher* was set forth to establish the appropriate standards for employer liability in cases where a supervisor creates a sexually hostile working environment without imposing any tangible job detriment. This is the exact issue in the instant case.

In formulating the appropriate standard in *Ellerth/Faragher*, this Court indicated its desire to "accommodate the agency principles of vicarious liability for

harm caused by the misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees." *Ellerth at 764*. Moreover, the Court stated that beyond pure agency considerations, its rule ought to reflect Title VII's concern with "the creation of antiharassment policies and effective grievance mechanisms," especially "Congress' intention to promote conciliation rather than litigation in the Title VII context and the EEOC's policy of encouraging the development of grievance procedures." *Ellerth, 524 U.S. at 764*.

Petitioner's interpretation of the second prong clearly does not "ignore the reasoning and policy considerations of Title VII." To the contrary, Petitioner's interpretation focuses on the Court's desire to accommodate two issues, one of which was to "accommodate the agency principles of vicarious liability for harm caused by the misuse of supervisory authority." Petitioner's interpretation is drawn directly from this Court's explanation of the affirmative defense available to an employer. This Court set forth the prongs of the affirmative defense only after outlining Title VII's purpose, therefore it seems logical that the prongs incorporate any and all reasoning and policy considerations of Title VII. Furthermore, Petitioner's interpretation merely reiterates the importance that in order to avail itself of an affirmative defense, an employer must show that it acted reasonably and that the employee acted unreasonably.

Respondents statement that "Most courts that have interpreted the affirmative defense have refused to hold employers who respond properly to complaints of sexual harassment liable for the actions of their supervisors" simply illustrates Petitioner's point that certain lower courts' (along with the District Court and Sixth Circuit) are misapplying the

Ellerth/Faragher defense and in a way never intended by this Court.

While several lower courts are still misapplying the defense and incorrectly focusing just on the first prong of the defense, in order to issue result-oriented decisions, they are nonetheless misapplying the defense. As both Petitioner and Respondent cite, in *Moore v. Sam's Club, 55 F.Supp.2d 177 (S.D. NY 1999)*, the court there first held that Sam's Club had exercised reasonable care both in formulating its policy and in responding to the complaint. *Moore at 191.* The court then held, however, that Sam's Club could not prevail on the second prong of the defense because the plaintiff took full advantage of the preventative measures provided, and therefore had not acted unreasonably. *Id. at 192.* Thus, Sam's Club did everything it could have, but still lost the argument because the plaintiff also had acted appropriately.

Further, in *Watts v. Kroger Co., 147 F.3d 460 (5th Cir. 1998)*, the Fifth Circuit initially affirmed summary judgment in favor of the employer on the ground that the employer took prompt remedial action after Watts complained to her store manager that her supervisor was harassing her. After the *Ellerth* decision was handed down, however, the Fifth Circuit withdrew its opinion and subsequently reversed its judgment on the grounds that the employer could not, as a matter of law, establish that Watts "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer."

Accepting Petitioner's interpretation would not logically cause the "anomalous" results suggested by Respondents on page 11 of their brief. This Court's decision is clear: an employer must exercise reasonable care to prevent and correct promptly any sexually harassing behavior, ***and***

the employee must have unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Ellerth* at 765. Failure to satisfy either of the prongs, subjects the employer to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. *Id.* Petitioner's interpretation is the Supreme Court's interpretation and merely follows the precise wording of the *Ellerth/Faragher* defense. Finding reasonable conduct on the employer and employee's part is undoubtedly the gist of the affirmative defense, and that is why this issue is before this Court today - the District Court and Sixth Circuit did not make an implied or express finding that Petitioner (employee) acted unreasonably. As such, Respondents were not entitled to summary judgment.

II. The Questions Presented Are Important and the Decision of the Sixth Circuit Adversely Impacts Members of Protected Classes, and Eradicates the Benefits of Title VII

Because circuits, such as the Sixth, are issuing result-oriented decisions and focusing mostly (if not exclusively) on the employer's preventive policies and corrective action taken in response to complaints of sexual harassment, the goals, principles and guidance set forth in *Ellerth* and *Faragher* are not being accomplished or followed. Instead, lower courts are misapplying the defense, and thus employers are being held not liable for actionable hostile environments created by their supervisors with immediate (or successively higher) authority over victimized employees.

Ellerth and *Faragher* are controlling authority on this issue in the Sixth Circuit, but the substantive law of both

decisions has been flatly ignored by the district court and the Sixth Circuit. Furthermore, the Sixth Circuit's affirmance of the district court's decision is contrary to, and is a departure from, the law set forth by this Court in *Ellerth* and *Faragher*. It further ignores United States Supreme Court precedent and this Court's bestowing on lower courts and employers of specific guidance on how to handle sexual harassment claims. The Sixth Circuit's decision is incorrect and erroneous as a matter of law.

An important part of the legacy of *Faragher* is not merely the recognition that traditional agency principles make employers liable for the discriminatory behavior of their supervisory employees, but rather that the behavior that Title VII aims to preclude is behavior that unfairly keeps women out of the workplace by making it too hostile for them to stay there. Benjamin E. Griffith, *Sexual Harassment in the Public Workplace* (2001), at p. 9. Its provision of an affirmative defense for environmental claims not involving tangible job detriments illumines what the Court sees as the purpose of Title VII: not merely to permit lawsuits, but rather to encourage an end to discrimination in the workplace by putting a price tag on anything short of zero-tolerance. *Id.*

The Sixth Circuit's decision impacts female employees' rights to protect themselves, and seek remedy for, such harassment and discrimination by supervisors who are aided by (1) their authority and ability to hire, fire and affect the terms and conditions of female workers and (2) their proximity and regular contact which affords them access to a captive pool of potential victims.

The Supreme Court needs to accept *certiorari*, and bring the Sixth Circuit into compliance with 42 U.S.C. §2000e, Title VII of the Civil Rights Act of 1964, as well as

this Court's decisions in *Ellerth* and *Faragher*. Otherwise, chaos will exist and the purpose of Title VII and *Ellerth* and *Faragher* will continue to be subverted and not accomplished. Respondent's Brief in Opposition demonstrates why the Petition should be granted, because it demonstrates the confusion surrounding the proper application of the law.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Frank M. Payson
Counsel of Record
Attorney for Petitioner
120 W. Second Street, Suite 400
Dayton, Ohio 45402
(937) 222-4529 phone
(937) 222-8044 fax